

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-12091-NMG

FREDERICK H. TARR, III,
Plaintiff

v.

**TOWN OF ROCKPORT, MICHAEL
RACICOT, NICOLA BARLETTA,
CHARLES CLARK, ROXANNE TIERI and
JOANNE WILE,**
Defendant

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS
REGARDING CERTIORARI REVIEW UNDER F.R.C.P. RULE 12(c)**

The Defendants herewith submit this Supplemental Memorandum in order to respond and refute the Plaintiff's Opposition and Plaintiff's Memorandum in Support of Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment on the Pleadings Regarding Certiorari Review under F.R.C.P. Rule 12(c) [sic].

I. LEGAL RESIDUUM RULE.

The Plaintiff argues in his Opposition that the evidence within the Certified Record of Proceedings which supports the administrative decision of the Board of Selectmen (hereinafter "Board") to remove the Plaintiff Frederick H. Tarr III from the Rockport Conservation Commission was exclusively hearsay. The Plaintiff further argues that the "Legal Residuum Rule" invalidates an administrative decision which is only supported by hearsay or other legally incompetent evidence. He cites *Sinclair v. Director of Division of Employment Security*, 141

Mass. 101 (1954). This decision involved denial of unemployment benefits based on plaintiff's alleged failure to conform to the employer's policy to ring up all sales in the cash register at the time of the sale. The only evidence to show the employee's violation was multiple layers of hearsay by persons without personal knowledge. In *Embers of Salisbury, Inc. vs. Alcoholic Beverages Control Commission*, 401 Mass. 526 (1988), the court clarified the *Sinclair*, supra, decision. "Although in that [Sinclair] case we said that '[i]f the pertinent evidence is exclusively hearsay, that does not constitute substantial evidence even before an administrative tribunal,' *Sinclair*, supra, at 103, the line we were drawing was not between evidence admissible in a court and evidence that is inadmissible because of the rules of evidence observed by courts but between evidence having indicia of reliability and probative value and that which does not.... This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value" at p. 530. More recently, the Massachusetts Supreme Judicial Court stated in *Covell v. Department of Social Services*, 439 Mass. 766 (2003) "[w]e reject Covell's suggestion that the evidence of abuse can not be 'substantial' because [victims'] statements were presented only through hearsay sources.... Substantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability'. *Embers of Salisbury, Inc.* [supra]" at p. 785-786. "While live testimony may provide the optimal opportunity for the assessment of credibility, the fact that parties before an agency have differing versions of critical events does not make live testimony the sine qua non for satisfying the substantial evidence test." at p. 787. The *Covell*, supra, decision effectively overruled the *Sinclair*, supra, decision.

The Defendants point out that the evidence considered by the Board was not exclusively hearsay evidence. As noted in the June 8, 2004 meeting minutes (Exhibit C, p. 1), Board Chairman Roxanne Tieri attended the Conservation Commission meeting of May 19, 2004. The plaintiff testified at the Board meetings of June 8, 2004 and July 6, 2004. Conservation Commission member Andy Heinze attended the July 6, 2004 meeting and stated that he has been at many meetings where Mr. Tarr has made inappropriate comments. "Mr. Tarr does not bite his tongue when he is bothered, he says what he feels." The letters and e-mail of Rockport citizens, Exhibits A, H, I and J described first-hand experiences and observation that each had or made regarding Mr. Tarr's behavior. This is different from the multi-level hearsay statements contained in the case of *Sinclair v. Direction of Division of Employment Security*, supra.

The Defendants argue that the totality of the Certified Record of Proceedings is evidence which has indicia of reliability and probative value. This is substantial evidence to establish "cause" for removal and thereby supports the Board's decision to remove the plaintiff from the Rockport Conservation Commission.¹

II. OPEN MEETING LAW.

The Plaintiff made the bald assertion in his Opposition to Defendants' Motion and his Memorandum in Support of Plaintiff's Opposition, that the Defendants committed a violation of the Open Meeting Law. (M.G.L.A.c. 39 §23B). This is a patently false statement.

¹The Defendants assert that the standard of review to determine whether "cause" was established is the arbitrary and capricious standard. See Defendants' Memorandum in Support of Defendants' Motion for Partial Judgment on the Pleadings Regarding Certiorari Review under F.R.C.P. Rule 12(c) at p. 8-9.

Plaintiff proffers no credible, probative or admissible evidence to support this allegation. Instead, the Plaintiff fallaciously argues that the violation is shown “by virtue of the letter he received from Michael J. Racicot, Town Administrator (Exhibit M to Certified Record of Proceedings) which indicated that the Board of Selectmen would be considering other alleged incidents which he proceeded to list.” The Plaintiff then erroneously stated “Nowhere is there any indication of any action at either of the previous Board of Selectmen Meetings that any thing other than one incident and one complaint would be considered by the Board of Selectmen through this letter”.² The Exhibits in the Certified Record of Proceedings belie Mr. Tarr’s assertions.

The Notice dated June 1, 2004 to Mr. Tarr expressly states that on June 8, 2004 a meeting “under M.G.L. c. 39 §23B for the following reasons: to hear complaints or charges brought against a public officer, employee, staff member or individual. It has been reported that [redacted] acting in your public capacity as a member of the Conservation Commission made extremely inappropriate comments to attendees at a public hearing.” The notice on its face did not limit the “complaints and charges” to the May 19, 2004 meeting. (Certified Record of Proceedings Exhibit B). At the public hearing on June 8, 2004, the Town Administrator explained that a public hearing opens the process to the public to testify to good qualities **as well as other incidents that have happened. Mr. Tarr will be made aware of all charges prior to the public hearing.** (Emphasis added). (Certified Record of Proceedings Exhibit C p. 2). Clearly, Mr. Tarr was placed on notice at the Board’s June 8, 2004 meeting that other incidents or

²Plaintiff’s Opposition p. 1-2.

charges may be considered in the hearing to decide whether or not to remove the Plaintiff from the Conservation Commission. Additional incidents and complaints were sent to the Board between June 8, 2004 and the Board's meeting on July 6, 2004. (Certified Record of Proceedings Exhibits H, I and J) It is disingenuous for the Plaintiff to argue to this Honorable Court that he was unaware that other complaints or charges may be included at the meeting of July 6, 2004. In the notice dated June 30, 2004, the Town Administrator listed the complaints. The preface to the list stated "Examples of this type of behavior include, but are not limited to . . ." This notice by the Town Administrator is consistent with and pursuant to the Job Responsibilities of the Rockport Town Administrator approved July 30, 2002 (Exhibit 1 Affidavit of Michael J. Racicot, Exhibit A attached hereto). It would appear that the false supposition upon which Mr. Tarr relies is that the Board met on some undisclosed date and location and decided the agenda of the meeting or contents of the Notice to Mr. Tarr dated June 30, 2004. In fact, the meeting agenda or contents of the hearing notice are matters that can be accomplished by the Town Administrator or the Board Chairman. Among the Town Administrator's Job Responsibilities is "5. The Town Administrator shall make procedural and substantive preparation for the meetings of the Selectmen and shall anticipate the needs of the Selectmen for information and background material for setting policy and making decisions." "6. The Town Administrator in consultation with the Chairman shall prepare the agenda for meetings of the Board of Selectmen, bringing before the Board all matters requiring its attention and shall prepare and discuss recommendations and alternatives for decision-making." (Exhibit

I Affidavit Exhibit A Position Description and Job Responsibilities p. 2). There are no facts to show that the Board violated the Open Meeting Law in this matter.

The other false allegation contained in Plaintiff's Opposition³ is that "Mr. Tarr was not allowed to see any of the hearsay evidence prior to the meeting."⁴ The Town Administrator Michael J. Racicot avers in his Affidavit that neither he, nor any staff employee in his office refused or failed to permit Mr. Tarr to inspect the letters or e-mail contained in the Certified Record of Proceedings (See Exhibit 1, par. 4-5). The Plaintiff fails to provide any details to these spurious claims. Moreover, the Plaintiff stated in his Memorandum "[b]y way of background, Mr. Tarr had held elective office in Rockport for almost thirty years, including seven terms as a selectmen, including a stint as Chairman, Chairman of the Planning Board, as well as serving on countless boards and committees during that time. . . ."⁵ Therefore, Mr. Tarr undoubtedly knew that the exhibits contained in the Certified Record of Proceedings are public records under M.G.L. c. 4 §7 cl.26. If Mr. Tarr had made a request to inspect public records and if his request was refused or denied, he could have made a petition to the Supervisor of Records for an order to the custodian of such records (i.e. Town Administrator Michael Racicot) pursuant to M.G.L. c. 66 §10. In turn, the Supervisor of Records can notify the Attorney General or the appropriate county district attorney for enforcement. In his Opposition, the Plaintiff, Mr. Tarr, does not

³ at p. 2.

⁴The Plaintiff did not file an affidavit averring to this allegation and for that reason alone should be disregarded.

⁵at p. 1.

allege that he made a request to inspect records or that he petitioned the supervisor of records. As stated above, the Board's record keeper, Michael J. Racicot, denies that he refused or failed to comply with a request of Mr. Tarr to inspect public records in this matter. Furthermore, the Plaintiff, as an experienced public official believed the Board violated the Open Meeting Law, he could have lodged a complaint to the Essex County District Attorney. M.G.L. c. 39 F:8B expressly states that a county district attorney enforces this law. Defendants are unaware of any such complaint and Plaintiff makes no claim that he filed an Open Meeting Law complaint with the Essex District Attorney. It should be noted that Mr. Tarr wrote to the Board on July 6, 2004 (the day of the hearing), in which he requested that "my hearing be public and that the public be permitted to participate" (Record of Proceedings Exhibit 0). There is no claim or allegation in this letter that he was denied the opportunity to see public records. Similarly, there was no claim that the Board violated the Open Meeting Law. The July 6, 2004 Board public meeting minutes and Executive Session meeting minutes do not contain any claim or statement by Mr. Tarr that he was denied access to public records or that he accused the Board of violating the Open Meeting Law. Are Mr. Tarr's claims that the Board violated his rights regarding access to public records and the Open Meeting Law credible? Given the fact that Frederick H. Tarr II has "almost thirty years" of public service experience and knowledge, who "does not bite his tongue when he is bothered [and] he says what he feels"⁶, it is highly unlikely that Mr. Tarr would have remained silent both in his letter to the Board and at the public meeting on July 6, 2004,

⁶Andy Heinze, member of the Rockport Conservation Commission, gave this description of Plaintiff, Mr. Tarr, at the July 6, 2004 meeting. (Certified Record of Proceedings Exhibit P p.4).

believed that the Board violated his rights. The Defendants respectfully argue that the Court should assign no weight or admissibility to the Plaintiff's specious unsworn allegations in this matter. Notwithstanding the above, the Defendants assert that the unsupported allegation that the Board violated the Open Meeting Law or Public Records Access Law do not, per se, mitigate against the fact that the Board's decision was based on substantial evidence to establish cause to remove the Plaintiff.

III. CONCLUSION.

The Defendants respectfully assert that the Certified Record of Proceedings constitute reliable and probative evidence, despite the fact that some of it would be deemed hearsay. The Board decided that there was cause to remove the Plaintiff from the Conservation Commission based on substantial evidence. The Plaintiff proffered no admissible probative evidence to show that the Board committed an Open Meeting Law violation or Public Records access violation. Moreover, the Defendants deny that they committed an Open Meeting Law and/or Public Records access violation. The Plaintiff fails to establish that the Board committed a substantial error of law apparent in the record which adversely affected Mr. Tarr's rights. Accordingly, the Plaintiff's claim for Certiorari Review ought to be dismissed with prejudice.

Respectfully submitted,

THE DEFENDANTS,

By their attorney,

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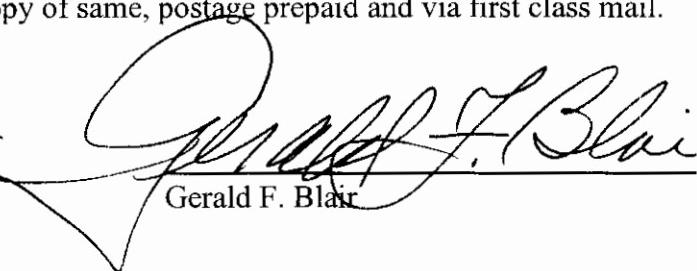
CERTIFICATE OF SERVICE

I hereby certify that the Defendants' Supplemental Memorandum in Support of Defendants' Motion for Partial Judgment on the Pleadings Regarding Certiorari Review under F.R.C.P. F.R.C.P. Rule 12(c) and Affidavit of Michael J. Racicot Town Administrator of the Town of Rockport were served upon John L. Hamilton, Esquire, 10 Lee Park, South Hamilton, MA 01982 and Philip D. Moran, Esquire, Philip D. Moran, P.C., 265 Essex Street, Suite 202, Salem, MA 01970 attorneys for plaintiff/opposing party by mailing a copy of same, postage prepaid and via first class mail.

Date:

Sept 28, 2005

Gerald F. Blair



A handwritten signature in black ink, appearing to read "Gerald F. Blair". The signature is fluid and cursive, with "Gerald" and "Blair" being more distinct and "F." being smaller.